SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

03/11/2002

CLERK OF THE COURT
FORM L000

HONORABLE MICHAEL D. JONES

P. M. Espinoza
Deputy

LC 2001-000714

FILED: _____

STATE OF ARIZONA

ROGER KEVIN HAYS

v.

LANCE T TURNER

KEVIN L BURNS

DOCKET-CRIMINAL-CCC
FILE ROOM-CSC
MESA CITY COURT
REMAND DESK CR-CCC

MINUTE ENTRY

MESA CITY COURT

Cit. No. #732444

Charge: 3. DUI WITH 0.10% BAC OR MORE

DOB: 07/15/74

DOC: 10/21/00

IT IS ORDERED directing the Clerk in Court File Services/Docket to amend the caption to reflect the true spelling of the Defendant's name to be: LANCE T. **TYRNER**.

This Court has jurisdiction of this appeal pursuant to the Arizona Constitution, Article VI, Section 16, and A.R.S. Section 12-124(A).

This matter has been under advisement and the Court has considered and reviewed the record of the proceedings from the trial court and the memoranda submitted by counsel.

The Appellant claims that a phlebotomist who is not supervised by a physician (as medical assistants are required under A.R.S. Section 32-1456(A)) is not a "qualified person within the meaning of A.R.S. Section 28-1388(A)" authorized to perform a blood draw to test for blood-alcohol content. Therefore, Appellant asserts that the trial judge erred in denying his Motion to Suppress the results of the blood draw.

First, this Court notes that A.R.S. Section 32-1456(A) is a regulatory statute governing medical assistants. That statute has no applicability to a forensic blood draw in a criminal case.[1]

Evidence was presented to the trial judge that a qualified individual performed the blood draw in this case. It is important to note that there is no question but that the blood draw was performed properly by someone who knew what (s)he was doing, who had experience, and that no physical harm was caused to the Appellant during the blood draw. The only question is whether the phlebotomist was supervised by a physician. The trial judge found that the phlebotomist was a qualified individual within the meaning of applicable law.[2]

Most importantly, A.R.S. Section 28-1388(A) provides in the second sentence of the section:

[1] State of Arizona ex rel. Pennartz v. Olcavage, 200 Ariz. 582, 30 P.3d 649 (App.2001).
[2] A.R.S. Section 28-1388(A); State v. Nihiser, 191 Ariz. 199, 953 P.2d 1252 (App. 1997).

> The qualifications of the individual withdrawing the blood and the method used to withdraw the blood are not foundational prerequisites for the admissibility of a blood-alcohol content determination made pursuant to this subsection.

Appellant seems to have ignored the second sentence of this statute as quoted above. Clearly, our legislature has provided that the qualifications of the individual or phlebotomist withdrawing the blood are not foundational prerequisites for the admissibility of the alcohol content of the blood. There is no statutory or constitutional right to have a medical assistant or phlebotomist supervised by a physician perform a blood draw under either Arizona law or Federal law.

Appellant's complaints regarding the phlebotomist are, therefore, without merit. The trial judge correctly denied the Motion to Suppress for the reasons that the qualifications of the person making the blood draw are not prerequisites to the admissibility of the results of the blood draw.

Appellant also complains that the trial court improperly admitted evidence from witness, Kenneth Haley that in his opinion the number of clues observed by Appellant's performance on the HGN test indicated a 65% chance that Appellant's blood alcohol concentration level exceeded .10. Appellant's only objection was foundation. Appellee correctly points out that Appellant did not object to the prosecutor's follow-up question whether the probability of blood alcohol concentration greater than the legal limit increases when there are additional cues of intoxication. Specifically, the prosecutor asked:

> And does that probability increase or decrease when clues are - - additional clues are seen on the individual performing field sobriety test?[3]

[3] R.T. of August 14, 2001 at page 90.

Kenneth Haley answered, "it increases."[4] The general rule is that the failure to object to evidence or testimony at trial constitutes a waiver of that objection on appeal in the absence of fundamental error.[5] This Court does not find any error in the admission of the testimony of Kenneth Haley given the amount of substantial compelling evidence against Appellant.

Appellant also contends that the trial court erred in allowing testimony and evidence regarding the blood test kit because of a deficient chain of custody. However, the proponent of evidence need not prove a chain of custody by calling every person who had contact with the evidence.[6] Rather the proponent of evidence must prove that the object offered is in substantially the same condition as when the crime was committed or the object was seized.[7] This Court finds no error by the trial court in permitting testimony and admitting the State's exhibit concerning the blood alcohol level.

Finally, Appellant contends that testimony from the State's criminalist, Gregory B. Ohlson, was prejudicial. Mr. Olson testified about the legal impairment level utilized by other states in other countries. He stated, "if you go to Scandinavia it's a 0.02."[8] The trial court sustained Appellant's counsel's objection to the question as non-responsive. The trial court also struck any references to other states' legal standards and instructed the jury to disregard that portion of Mr. Ohlson's testimony. Counsel for Appellant did not move for a mistrial, nor did counsel request any additional instructions other than those given by the trial court. Given the fact that evidence was presented that Appellant's blood alcohol content was .111, it is difficult to see how Appellant was prejudiced in any way from Mr. Ohlson's testimony. Further, the trial court

[4] Id.
[5] State v. Gendron, 168 Ariz. 153, 812 P.2d 626 (1991).
[6] State v. Davis, 110 Ariz. 51, 514 P.2d 1239 (1973).
[7] Id.
[8] R.T. of August 14, 2001, at page 114.

instructed the jury that the testimony was stricken and they were not to consider it for any purpose. This Court finds no error.

IT IS THEREFORE ORDERED affirming the judgment of guilt and sentence imposed by the lower court.

IT IS FURTHER ORDERED remanding this case back to the Mesa City Court for all further and future proceedings in this case.